Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

89-1082
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JONES HIRSCH CONNORS & BULL,

Petitioner,

– against –

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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December 22, 1989

QUESTION PRESENTED

Is an order of the United States District Court which imposes sanctions against counsel "final" for purposes of immediate appellate review by an appropriate United States Court of Appeals?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, the law firm of Jones Hirsch Connors & Bull, is counsel to American International Group, Inc. ("Group") and AIG Consultants, Inc. ("Consultants"). Both are among the hundreds of defendants in the "litigatory monster"* more properly known as In re: San Juan Dupont Plaza Hotel Fire Litigation, MDL No. 721 (D.P.R. 1987), which presently is in

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* This term was ascribed to the underlying multidistrict litigation by Justice Bruce M. Selya in his opinion dismissing the matter captioned In re Recticel Foam Corp., 859 F.2d 1000 (1st Cir.), later procd'g, 859 F.2d 1007 (1988), wherein one of the other defendants petitioned the United States Court of Appeals for the First Judicial Circuit for a writ of mandamus regarding the District Court's imposition of cost-sharing assessments in the amount of approximately $35,000 per defendant to pay joint litigation costs simply by virtue of having been named as a defendant to the underlying multidistrict litigation.

a second phase of trial proceedings before the Honorable Raymond L. Acosta of the United States District Court for the District of Puerto Rico ("the District Court").* Petitioner was not, and to this date still is not, a party to the District Court proceedings. Petitioner became a party appellant before the First Circuit after the District Court imposed sanctions personally against petitioner law firm during the

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* Because of the sheer enormity of this multidistrict litigation, the District Court ordered that the claims proceed to trial in approximately five different stages or phases. For example, the first phase related to the plaintiffs' case against the group of defendants related to the management, ownership and/or operation of the San Juan Dupont Plaza Hotel ("the Hotel"). The instant second phase involves the plaintiffs' claims against the various defendants who allegedly supplied products and/or services to the Hotel.

representation of its clients in proceedings before the District Court.

Because at one point there were more than twenty-five hundred (2,500) parties to the District Court proceedings, the District Court appointed a liaison for the twelve counsel committee representing the over twenty-two hundred (2,200) plaintiffs, otherwise known as the Plaintiffs' Steering Committee Liaison. Similarly, the District Court appointed a liaison for the over three hundred (300) defendants, known as the Defendants' Liaison Person. Pursuant to orders of both the District Court and the First Circuit, these liaisons are served with papers as representatives of the various plaintiff and defendant parties.

Although these liaisons were properly served on behalf of the parties they represent, to

petitioner's knowledge, no plaintiff nor other defendant submitted any papers to the First Circuit prior to the dismissal of petitioner's subject appeal. Thus, petitioner is unaware of any other interested party to the appellate proceedings before the First Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

IN RE: SAN JUAN DUPONT PLAZA
HOTEL FIRE LITIGATION,

JONES HIRSCH CONNORS & BULL,

Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PRELIMINARY STATEMENT

Petitioner, the law firm of JONES HIRSCH CONNORS & BULL ("petitioner"), appearing pro se, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court Of Appeals for the First Judicial Circuit ("the First Circuit"), entered on October 3, 1989.

OPINIONS AND ORDERS

The First Circuit entered an order on August 8, 1989, to show cause why it had jurisdiction to review the sanctions imposed against petitioner by the District Court.* After petitioner responded on August 21, 1989, the First Circuit issued an order dismissing petitioner's appeal based on a determination that jurisdiction did not exist because the District Court's order was not a "final" judgment from which an immediate appeal would lie in accordance with 28 U.S.C. § 1291. These documents are reproduced as part of this petition in Appendices A, B, and C, respectively.

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* Those sanctions were imposed by the District Court pursuant to that portion of Court Margin Order No. 453 (Docket No. 11809), filed July 5, 1989, which denied petitioner's motion (Docket No. 10550), dated June 6, 1989, requesting reconsideration of sanctions imposed pursuant to Pretrial Order No. 189 (Docket No. 10463), dated June 1, 1989.

JURISDICTION

This Court has jurisdiction to review the judgment of the First Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS

This case presents an issue arising out of 28 U.S.C. § 1291 which provides, in relevant part, as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . .*

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* According to the revision notes to 28 U.S.C. § 1291, the District Court for the District of Puerto Rico is embraced in the term "district courts of the United States."

STATEMENT OF THE CASE

A. Proceedings in the District Court*

On May 6, 1989, the District Court issued various pretrial orders regarding the second phase of trial proceedings in the underlying Multidistrict Litigation No. 721. In an appendix to one of those orders, the District Court identified those defendants who were to be parties to the second trial phase. That appendix did not include either of petitioner's two clients, Group and Consultants. As part of that order, the District Court also gave the plaintiffs' representative attorneys, the Plaintiffs' Steering Committee ("PSC"), until May 30, 1989, to move to either modify, amend, or correct the appendix. On the morning of May

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* A detailed recitation of the underlying facts is reproduced in Appendix B hereto as part of petitioner's response to the First Circuit's order directing petitioner to show cause regarding the issue of jurisdiction.

31, 1989, petitioner contacted the District Court and was informed that on or about May 30, 1989, the PSC filed a motion adding both of petitioner's clients, Group and Consultants, to the list of entities contained in the appendix and against whom they intended to begin trial proceedings on June 27, 1989.

By adding Group and Consultants at this late date, the PSC made it virtually impossible for petitioner to timely comply with certain June 2, 1989 deadlines contained in the various above-referenced pretrial orders requiring the parties to (i) exchange pretrial memoranda, (ii) exchange exhibit lists, and (iii) submit exhibit sets to the joint document depository.*

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* Because of the enormous volume of documents involved in this case, the District Court established a joint document depository to function as a repository for every document of any type which is germane to the case.

Despite this short notice, on June 2, 1989, petitioner substantially complied with the June 2, 1989 deadlines by telecopying to the Defendants' Liaison Person, the PSC's Liaison, as well as the joint document depository, copies of the pretrial memoranda and exhibit lists submitted on behalf of both of its clients, Consultants and Group. Additionally, on June 2, 1989, petitioner shipped two copies of the exhibit sets on behalf of both Consultants and Group via express courier to the joint document depository. In other words, the only items which were not actually physically received and filed on June 2, 1989, were the exhibit sets which were sent via overnight courier, the fastest way petitioner could forward them from New York to Puerto Rico.

Due to petitioner's extraordinary efforts, the PSC, along with all other defendants, were timely in possession of Consultants and Group's pretrial memoranda and exhibit lists on Friday,

June 2, 1989. Nevertheless, the District Court imposed $500 a day sanctions against petitioner law firm personally because the exhibit sets were not physically received in Puerto Rico until Monday, June 5, 1989.* Thereafter, petitioner moved the District Court on June 6, 1989, for reconsideration of the imposed sanctions.

Meanwhile, the PSC abandoned its fraudulent claims against Group, one of petitioner's clients! Petitioner moved the District Court on June 15, 1989, for the immediate dismissal of its client, Group, due to the PSC's failure to prosecute. At the same time, petitioner requested on behalf of Group, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the imposition of sanctions against the PSC due to

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* In so doing, the District Court did not specify whether it was acting pursuant to either Rule 11 or Rule 37 of the Federal Rules of Civil Procedure or in accordance with 28 U.S.C. § 1927.

its reprehensible actions in (i) unjustly and without foundation having made Group a party to this litigatory monster, (ii) sit and wait for two years to have its day in court, (iii) pay thousands of dollars in assessments, and (iv) endure the costs and expenses of legal fees to defend itself. On June 29, 1989, the District Court dismissed Group from this litigation, but inexplicably denied Group sanctions against the PSC for its reprehensible conduct in naming Group as a defendant without any intention of ever pursuing its fictitious claims.

Despite the fact that the PSC forced petitioner, for absolutely no reason, to prepare a pretrial memorandum, exhibit lists, and exhibit sets on behalf of Group, the District Court on July 5, 1989, only six days after dismissing Group, denied petitioner's request for reconsideration of the imposed sanctions. Rather, on July 7, 1989, the District Court

advised petitioner to pay one thousand dollars ($1,000) in sanctions to the District Court's clerk of court. Petitioner paid the District Court's clerk of court on July 11, 1989. It is from the imposition and payment of these sanctions which petitioner appealed to the First Circuit by a notice of appeal dated July 14, 1989.

B. Proceedings In The Court of Appeals

On August 8, 1989, the First Circuit issued an order directing petitioner to show cause why the First Circuit possessed jurisdiction to review the propriety of the District Court's sanctions order in light of the finality principles of 28 U.S.C. § 1291 (Appendix A). Petitioner complied by filing its response on August 22, 1989 (Appendix B).

In that response, petitioner emphasized that the controlling First Circuit panel case, Appeal

of Licht & Semonoff, 796 F.2d 564 (1st Cir. 1986), was distinguishable and inapplicable. Alternatively, in the event that the First Circuit found its panel decision in Licht applicable, petitioner argued that the panel opinion should be reviewed by the First Circuit, en banc, because it is contrary to the more recent decisions of at least five other United States Courts of Appeals which unequivocably have determined that a district court's imposition of sanctions against counsel is an immediately appealable final order.

Despite this response, the First Circuit, on October 3, 1989, concluded, in light of the panel decision of Licht applying 28 U.S.C. § 1291, that it did not possess jurisdiction over petitioner's appeal. Additionally, the First Circuit determined that the District Court's order at issue did not warrant en banc

consideration of the continued viability of the Licht decision (Appendix C). Accordingly, the First Circuit dismissed petitioner's appeal (Appendix C). It is from the dismissal of petitioner's appeal that this writ is sought.

REASONS FOR GRANTING THE WRIT

A. The First Circuit's Order To Dismiss Petitioner's Appeal For Lack Of Jurisdiction Is Contrary To The More Recent Decisions Of At Least Five Other Circuits

The First Circuit's panel decision in Licht & Semonoff, 796 F.2d 564 (1st Cir. 1986), is contrary to the more recent decisions of at least five other United States Circuit Courts of Appeal. Specifically, the Second, Sixth, Seventh, Ninth, and Eleventh United States Circuit Courts of Appeals more recently have held, in stark contrast to the First Circuit's panel decision in Licht, that a district court's

order imposing sanctions against counsel is a "final" immediately appealable order.*

Most recently, the United States Court of Appeals for the Second Circuit decided Hoar v. Sara Lee Corp., 882 F.2d 682 (2d Cir. 1989).

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* Although prior to this Court's Licht panel decision, the Third Circuit also has held that an order imposing sanctions against counsel is immediately appealable. See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537-39 (3rd Cir. 1985).

Meanwhile, the Fifth Circuit apparently has not definitively ruled. In Click v. Abilene National Bank, 822 F.2d 544 (5th Cir. 1987), a panel of the Fifth Circuit ruled that a district court's imposition of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure is a nonfinal order. Id. at 545. Later, however, in Schaffer v. Iron Cloud, Inc., 865 F.2d 690 (5th Cir. 1989), another panel of the Fifth Circuit specifically stated that:

> Click does not indicate whether the order imposing sanctions in that case required immediate payment, and this court has not determined whether such orders are final for purposes of appeal.

Id. at 692.

See also Sanko Steamship Co. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987). In Hoar, Justice Frank X. Altimari of the Second Circuit observed that this Court "held in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1948), that some rights are simply 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated'." 882 F.2d at 685. Applying this Court's Cohen test and its own decision in Cheng v. GAF Corp., 713 F.2d 886 (2d Cir. 1983), the Second Circuit concluded that:

> [a]s to the first requirement, the assessment of the Rule 37 sanctions in the amount of $14,815.40 by the district court, after an appeal of the magistrate's order, amounts to "conclusive determination" (citations omitted). The second requirement is satisfied, since the imposition of the sanction involved an issue "completely separate from the merits of the underlying litigation".

> The third Cohen requirement presents a thornier issue. In Cheng, however, we enumerated several reasons why a sanction imposed on a non-party attorney is effectively "unreviewable after final judgment." (footnote omitted). First, in the face of settlement negotiations, an attorney might be placed in an "ethical dilemma" since "his view of any settlement proposal would almost certainly be colored by its handling of the attorneys' issue" (citation omitted). In addition, the plaintiff's attorney, as a non-party, would be dependent on the plaintiff for appellate review which would be unlikely "[i]f the case is settled, or if petitioner succeeds on the merits" (citation omitted). Most importantly, a non-party attorney, like a non-party in civil contempt proceedings, would be precluded from arguing the propriety of the Rule 37 sanction for attorneys' fees including expenses in an appeal from the final judgment (citations omitted).

882 F.2d at 685-86.

> We note that forcing an attorney to await final judgment, with such a sanction outstanding against him, may seriously affect his professional reputation; it will almost certainly affect the attorney's relations with his client as they must determine the share of the financial burden which each of them must bear in discharging the allegation imposed against them jointly. Therefore, the attorney should be able to appeal before any

> final judgment. He suffers immediate injury from the sanction whereby the court has made him a party to the case so far as the sanction is concerned. His only effective remedy is to have the right to appeal before the final judgment. Accordingly, consistent with our holding in Cheng, we would grant jurisdiction were the sanction imposed on the non-party attorney alone, since unless there is the opportunity for review at this point in the proceedings, there effectively is no right to review at all.

882 F.2d at 686.

Both the Sixth and Seventh Circuits similarly have stated that a non-party attorney has an immediate right to appeal, although neither offered much analysis for their reasoning. The Sixth Circuit, in Lundblad v. Celeste, 874 F.2d 1097 (6th Cir.), vacated pending en banc review, 882 F.2d 207 (1989), relying on a Ninth Circuit opinion, stated that it might have jurisdiction if the lawyer had in fact appealed in his own name. Id. at 1105. In Rogers v. National Union Fire Insurance Co., 864 F.2d 557 (7th Cir. 1988), the Seventh Circuit summarily stated that sanction orders against attorneys are appealable before final judgment

as collateral orders. Id. at 559. See also Magnus Electronics, Inc. v. Masco Corp. (Appeal of Brainerd), 871 F.2d 626, 630 (7th Cir.), cert. denied, ___ U.S. ___, 107 F.2d 188 (1989); In re Ronco, Inc. (Appeal of Levit & Mason, Ltd.), 838 F.2d 212, 213 n. 1 (7th Cir. 1988); Frazier v. Cast, 771 F.2d 259, 262 (7th Cir. 1985).

The Ninth Circuit has dealt with this issue at least three times in the past two years. In Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548 (9th Cir. 1986), cert. denied, 484 U.S. 822 (1987), the Ninth Circuit stated that "[a]n order imposing sanctions solely upon counsel, a non-party to the underlying action, is immediately appealable as a final order." Id. at 556, citing Optyl Fashion International Corp. v. Style Companies Ltd., 760 F.2d 1045, 1047 n. 1 (9th Cir. 1985); and Kordich v. Marine Clerks Assn., 715 F.2d 1392, 1393 (9th Cir. 1983). Another Ninth Circuit panel said the same in Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987). Most recently, in Aetna Life Insurance Co. v. Alla Medical

Medical Services, Inc., 855 F.2d 1470 (9th Cir. 1988), the Ninth Circuit visited this issue once more. In response to urgings by the petitioner to overturn the panel in Unioil, the Aetna panel of the Ninth Circuit stated:

> All prior holdings that sanction orders issued solely against non-party attorneys are immediately appealable is controlling absent overruling by the Supreme Court or an en banc panel. Levick v. Skaggs Companies, 701 F.2d 777, 778 (9th Cir. 1983). We note that Rule 11 sanctions against non-party attorneys are immediately appealable has been reaffirmed subsequent to the Supreme Court's most recent pronouncements in 1985 of the appealability of rulings on motions to disqualify attorneys. See Unioil, 809 F.2d at 556. Absent overruling, we must follow the law of this Circuit. Fenton v. Freedman, 748 F.2d 1358, 1359 n.1 (9th Cir. 1984). Accordingly, this sanction order, imposed solely against the non-party law firm is an immediately appealable order under Section 1291.

Aetna, 855 F.2d at 1473.

Finally, the Eleventh Circuit has reviewed this issue on at least two separate occasions since the First Circuit decided Licht. Shortly

after Licht was rendered, the Eleventh Circuit stated in Robinson v. Tanner, 798 F.2d 1378 (11th Cir. 1986), cert. denied, 481 U.S. 1039 (1987), that:

> The courts have found discovery sanction orders immediately appealable where the sanction consisted of dismissal of the suit or a denial or grant of an injunction, the sanction was against a non-party who might not be able to obtain review from a final judgment, or the sanction would cause irreparable injury to the petitioner (citations omitted).

Id. at 1381.

The Eleventh Circuit reached similar conclusions in Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512 (11th Cir. 1988):

> Petitioners urge that the district court's assessment of sanctions payable immediately against a party and that party's attorney falls within the doctrine of practical finality, Forgay v. Conrad, 47 U.S. (6 How.) 201, 12 L.Ed. 404 (1848), and also within the collateral order exception to the final judgment rule, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We agree. When a Rule 11 sanction directs

> a non-party (jointly and severally with parties to the action or alone) to pay immediately -- that is, before entry of final judgment -- significant attorney fees and costs, this court has jurisdiction to hear an immediate appeal of the sanction order.
>
> Under the particular facts of this case, defendants successfully plead their case under two exceptions to the finality rule. Under the doctrine of practical finality, announced in Forgay, review of an order before entry of judgment in the underlying case is permissible whenever the order directs "immediate delivery of physical property and subjects the losing party to irreparable harm" if review is delayed until the case is concluded. In re Martin Brothers Toolmakers, Inc. 796 F.2d 1435, 1437 (11th Cir. 1986).
>
> Under the collateral order doctrine, an order resolving issues independent and easily separable from other claims in a pending lawsuit can be appealed prior to entry of final judgment. To fall within the collateral order exception, an order must satisfy three criteria under Cohen. It must: 1) conclusively determine the disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. See Cohen, 337 U.S.at 545-47, 69 S.Ct. 1225-26; United States v. One Parcel of Real Property, 767 F.2d 1495, 1497 (11th Cir. 1985).

Ortho, 847 F.2d at 1515.

The facts of the instant case fall squarely within the parameters of the more recent

decisions of these other five United States Circuit Courts of Appeals. A sharp conflict exists between these decisions and those of the First Circuit. Because attorneys practicing in different circuits are being treated differently due to this conflict, this Court should issue a writ and resolve this jurisdictional issue.

B. The First Circuit's Decision Is Erroneous

In determining whether it possessed jurisdiction over the appeal in Licht, the First Circuit observed that:

> In cases such as the one before us involving an immediate appeal of a sanction order against present counsel to one of the parties to the case, the law is not settled.
>
> * * *
>
> A "final decision" is ordinarily one which disposes of all of the rights of the parties to an action (citations omitted). The purpose of the § 1291 requirement limiting appellate review

> to final decisions is to avoid peacemeal litigation, promote judicial efficiency, reduce the cost of litigation, and eliminate the delays caused by interlocutory appeals (citations omitted). The requirement of a final decision is to be given a practical, not a technical meaning (citations omitted).

Licht, 796 F.2d at 569.

Applying these principals to the facts before it in Licht, the First Circult reasoned with respect to the finality requirement of 28 U.S.C. § 1291 that:

> [a]s a practical matter, which is the way we must apply the finality requirement of § 1291, the sanction may never be finally imposed. The case may be settled and the sanction rescinded by the Court as part of the settlement agreement. Or the Court may rescind or modify the sanction after verdict. We are not suggesting that any of these possibilities should or will be followed in this case, but their existence detracts from the finality of the order. We hold that a discovery sanction against counsel to one of the parties is not a final decision under § 1291.

Licht, 796 F.2d at 570.

The above finding of the First Circuit in Licht involved far different facts than were

before it in this case. First, the sanctions imposed herein by the District Court did not arise out of a discovery order situation. Second, and much more importantly, the instant sanctions already have been imposed. Third, the District Court herein already has refused to rescind its order. Fourth, these sanctions already have been paid.

Unlike Licht, this case is a litigatory monster. It will continue indefinitely. There simply is no way of telling when the District Court will enter a final judgment from which petitioner may be able to finally bring an appeal to the First Circuit. And, by that time, petitioner's rights easily might be lost forever.

In essence, the First Circuit was clearly erroneous in finding its Licht panel decision controlling. But even if it were correct in applying Licht (which is not conceded), the First Circuit's Licht decision simply is erroneous for the various reasons stated above

in the more recent decisions of the five other Circuit Courts of Appeals.

C. The Issue Is Important And Likely To Reoccur

As a final point, this Court should grant this petition for issuance of a writ of certiorari because the jurisdiction of the Courts of Appeals is an important issue. While the monetary amount involved in the instant facts may, in itself, not be significant, that should not deter this Court from giving full consideration to this jurisdictional dichotomy.

Resolution of this issue is not merely an exercise "beyond the academic or the episodic". Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). The existence of this issue involves serious legal questions involving all counsel practicing before every one of the United States District Courts in any of the disctricts which are part of the jurisdiction of the First Circuit. There simply is no justification for disparate treatment of the attorneys in the First Circuit's jurisdiction from that of their

counterparts practicing before other United States Circuit Courts of Appeals.

Moreover, this issue is one which is likely to reoccurr. Indeed, in this specific case alone the District Court has issued orders imposing sanctions against various counsel on at least six different occasions.* Similarly, various other judges of the district courts within the jurisdiction of the First Circuit may, and most likely will, impose countless numbers of sanction orders against various counsel at one time or another in the future.

In essence, because this issue is of a jurisdictional nature and is likely to reoccur, this Court should grant this petition and resolve the existing conflict among the Circuit Courts of Appeals.

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* See, e.g., Pretrial Order Number 35, dated January 22, 1988 (Docket No. 1048; Pretrial Order No. 75, dated May 13, 1988) Docket No 2274); Pretrial Order No. 85 dated June 16, 1988, (Docket No 3081); Pretrial Order No. 129, dated December 12, 1988 (Docket No. 7268); Pretrial Order No. 205, dated June 27, 1989 (Docket No. 11693); and Order No. 225, dated December 4, 1989 (Docket No. 13269).

CONCLUSION

For all the foregoing reasons, petitioner, the law firm of Jones Hirsch Connors & Bull, respectfully submits that this petition for a writ of certiorari should be granted.

Dated: New York, New York
December 22, 1989

Respectfully submitted,

JONES HIRSCH CONNORS & BULL

By: Michael Piziali

Michael Piziali
101 East 52nd Street
New York, New York 10022

TO: Ana Luisa Navarro
Plaintiffs' Steering Committee Liaison

Carlos Padin
Defendants' Liaison Person

1693j

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1721

IN RE:
SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION,

AMERICAN INTERNATIONAL GROUP, INC. AND
AIG CONSULTANTS, INC.,
Appellants.

ORDER OF COURT

Entered August 8, 1989

Upon review of the record in this case, it appears that this court may not have jurisdiction to consider the appeal because the order appealed from does not appear to be a final judgment from which an immediate appeal would lie. See 28 U.S.C. § 1291.

The appellant is ordered to either move for voluntary dismissal under Rule 42(b) F.R.A.P. or to show cause why this appeal should not be dismissed. The failure to take either action by August 22, 1989 may lead to dismissal for failure to prosecute.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Mr. Piziali, Plaintiffs Steering Committee, Defendants Liaison Committee, Mr. Oliver]

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST JUDICIAL CIRCUIT

In re: San Juan Dupont Plaza Hotel Fire Litigation,	:	APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE
Jones Hirsch Connors & Bull, Appellant.	:	No. 89-1721

PRELIMINARY STATEMENT

Appellant, the law firm of JONES HIRSCH CONNORS & BULL ("appellant"), appearing pro se, respectfully submits this response to the order of this Court, the United States Court of Appeals for the First Judicial Circuit, entered August 8, 1989, to show cause why this Court has jurisdiction to review the sanctions imposed against appellant by the United States District Court for the District of Puerto Rico, the Honorable Raymond L. Acosta presiding. Those sanctions were imposed pursuant to that portion

of Court Margin Order No. 453 (Docket No. 11809), filed July 5, 1989, which denied appellants' motion (Docket No. 10550), dated June 6, 1989, requesting reconsideration of sanctions imposed pursuant to Pretrial Order No. 189 (Docket No. 10463), dated June 1, 1989.

ISSUE PRESENTED

Is an order of the district court imposing sanctions against counsel a final judgment from which an immediate appeal lies?

STATEMENT OF FACTS

On May 6, 1989, the district court issued Pretrial Order Nos. 179, 180, and 181, all regarding the second phase of trial proceedings in this multidistrict litigation. In Appendix A to Pretrial Order No. 179, the district court identified those defendants who would be considered to be parties to this second trial phase. As part of that order, the district court also gave the Plaintiffs' Steering

Committee ("PSC") until May 30, 1989, to move to either modify, amend, or correct Appendix A to Pretrial Order No. 179.

On the morning of May 31, 1989, at approximately 10:30 a.m., a representative of appellant telephoned the district judge's law clerk to inquire whether the PSC had submitted any modifications, amendments, or corrections to Appendix A of Pretrial Order No. 179. The law clerk informed this representative of appellant that on or about May 30, 1989, the PSC filed a motion adding both of appellant's clients, American International Group, Inc. ("Group") and AIG Consultants, Inc. ("Consultants"), to the list of entities contained in Appendix A to Pretrial Order No. 179.

By adding Group and Consultants at this late date, the PSC made it virtually impossible for Group and Consultants to timely comply with certain June 2, 1989 deadlines contained in Pretrial Order Nos. 179, 180, and 181. Specifically, it was almost impossible for Group and Consultants to comply with June 2, 1989

deadlines which required the parties to (i) exchange pretrial memoranda, (ii) exchange exhibit lists, and (iii) submit exhibit sets to the joint document depository.

Because it was May 31, 1989, only two days prior to June 2, 1989, when appellant learned that its clients were added, appellant drafted an emergency motion on behalf of Consultants and Group for merely a four day extension of time to June 6, 1989, to comply with the June 2, 1989 deadlines contained in the above-referenced orders. At the same time, appellant, most diligently, began compiling relevant exhibit sets as well as preparing exhibit lists and pretrial memoranda on behalf of both Consultants and Group in order to file all of the above on June 2, 1989, or as soon as possible thereafter.

At approximately 6:10 p.m. on the evening of June 1, 1989, an attorney in appellant's offices received a telephone call from the district judge's law clerk. Appellant was informed that the district court was issuing Pretrial Order No. 189 which denied appellant an extension of

time to file the two pretrial memoranda on behalf of its clients, Consultants and Group. In this order, the district court did grant appellant an extension of time until June 6, 1989, to file the exhibit sets and serve the exhibits lists on behalf of its clients, but imposed $500 a day sanctions for any failure to timely comply with the June 2, 1989 deadlines. These sanctions were imposed against appellant law firm personally, not either of its clients. On entering its ruling, however, the district did not specify if it was relying on either Rule 11 or Rule 37 of the Federal Rules of Civil Procedure or its inherent powers to control and supervise a lawsuit.

As part of Pretrial Order No. 189, the district court also granted the PSC an extension of time until June 6, 1989, to file its exhibit lists and exhibit sets. Because of the PSC's delay, on motion of the Chairman of the Defendants' Trial Liaison Counsel, the district court further ruled in Court Margin Order No. 420 that those defendants who wished did not

need to serve a copy of their exhibit lists upon the PSC. Rather, the district court ruled defendants merely needed to file their exhibit lists and sets with the Joint Document Depository on or before the June 2, deadline. The district court ordered that the PSC would not be able to even review, let alone be entitled to copies of, these exhibit lists and sets until after filing its own documents on or before June 6, 1989.

On June 2, 1989, appellant, on behalf of its clients, Consultants and Group, substantially complied with the June 2, 1989 deadlines by telecopying to the Defendants' Liaison Person, the PSC's Liaison, as well as the Joint Document Depository, copies of the pretrial memoranda and exhibit lists submitted on behalf of both Consultants and Group. Additionally, on June 2, 1989, appellant shipped two copies of the exhibit sets on behalf of both Consultants and Group by Federal Express to the Joint Document Depository. In other words, the only items which were not actually physically received and

filed on June 2, 1989, were the exhibit sets which were sent via overnight courier, the fastest way appellant could forward them from New York to Puerto Rico.

Consequently, due to appellant's extraordinary efforts, the PSC, along with all defendants, were in possession of Consultants and Group's pretrial memoranda and exhibit lists, on Friday, June 2, 1989. But, because of the PSC's own delay, neither Consultants nor Group, as with the other defendants, had any obligation pursuant to Court Margin Order No. 420 to even provide the PSC with the exhibit lists and sets on June 2, 1989. Thus, the PSC was not prejudiced in any way by the fact that the exhibit sets themselves were not received by the Joint Document Depository on June 2, 1989.

Thereafter, appellant moved the district court on June 6, 1989, for reconsideration of the sanctions imposed pursuant to Pretrial Order No. 189. As part of its argument, appellant pointed out to the district court that it had substantially complied with the June 2, 1989

deadlines. Everything was either filed by telecopier or forwarded for filing on June 2, 1989. Moreover, the PSC was not entitled to the documents until June 6, 1989, and never claimed any prejudice.

Meanwhile, the PSC failed to even serve appellant with a pretrial memorandum with respect to Group! This fact was confirmed by a telephone inquiry to the Defendants' Liaison on June 5, 1989. Although the district court in Pretrial Order No. 193 sanctioned the PSC and ordered reservice of the PSC's pretrial memoranda, the PSC, on June 7, 1989, again failed to serve any pretrial memorandum detailing any claim against against Group.

This failure by the PSC also was confirmed by a telephone inquiry of the Defendants' Liaison. During that telephone inquiry, appellant learned from the Defendants' Liaison that the PSC's Liaison, on serving the PSC's pretrial memoranda, indicated that the PSC had decided not to file any pretrial memorandum

regarding Group, effectively abandoning its spurious claims.

On June 12, 1989, at the PSC's request, a representative of appellant met with representative PSC attorneys regarding preparation of a stipulation of uncontested facts for the joint pretrial memorandum. To appellant's surprise, the PSC attorneys only made proposals regarding Consultants and failed to even mention Group. After meeting with the PSC on June 12, 1989, appellant checked the documents served and filed by the PSC with the Defendants' Liaison and the Joint Document Depository. Review of those documents filed in either office failed to disclose any reference by the PSC to Group. In short, by failing to file any documents regarding Group, the PSC made it impossible to prepare a defense on behalf of Group.

Appellant moved the district court on June 15, 1989, for the immediate dismissal of its client, Group, due to the PSC's failure to prosecute. At the same time, appellant

requested on behalf of Group, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the imposition of sanctions against the PSC due to its reprehensible actions in (i) unjustly and without foundation having made Group a party to this litigatory monster, (ii) sit and wait for two years to have its day in court, (iii) pay thousands of dollars in assessments, and (iv) endure the costs and expenses of legal fees to defend itself. On June 29, 1989, the district court issued Court Margin Order No. 448 wherein it dismissed Group from this litigation, but inexplicably denied Group sanctions against the PSC for its reprehensible conduct in naming Group as a defendant without any intention of ever pursuing its fictitious claims.

Despite the fact that the PSC forced appellant, for absolutely no reason, to prepare a pretrial memorandum, exhibit lists, and exhibit sets on behalf of Group, the district court turned around on July 5, 1989, only six days after dismissing Group, and denied appellant's request for reconsideration of the

sanctions imposed pursuant to Pretrial Order No. 189. On July 7, 1989, the district judge's law clerk informed an attorney in appellant's office that appellant should pay one thousand dollars ($1,000) in sanctions to the district court clerk of court due to the fact that the exhibit sets did not arrive in San Juan, Puerto Rico until June 5, 1989. In compliance, appellant paid the district court clerk of court on July 11, 1989. It is from the imposition and payment of these sanctions which appellant brings this appeal.

ARGUMENT
A DISTRICT COURT'S ORDER IMPOSING SANCTIONS AGAINST NON-PARTY COUNSEL IS A FINAL REVIEWABLE JUDGMENT OVER WHICH THIS COURT POSSESSES JURISDICTION

On filing its notice of appeal, appellant was well aware of this Court's decision in Appeal of Licht & Semonoff, 796 F.2d 564 (1st Cir. 1986). It respectfully is submitted, however, that this Court's decision in Licht & Semonoff simply is distinguishable and not applicable to the instant proceedings.

Moreover, this Court's decision in Licht & Semonoff is contrary to the decisions of at least five other United States Circuit Courts of Appeal, including the Second, Sixth, Seventh, Ninth, and Eleventh Circuits.

A. The Panel Decision In Licht & Semonoff Is Distinguishable And Inapplicable

As this Court undoubtedly is well aware, the decision by Justices Bownes, Breyer and Torruella in Licht & Semenoff determined that an appeal from an order of the district court imposing monetary sanctions against the law firm of Licht & Semonoff simply was not a final appealable order under 28 U.S.C. § 1291. In Licht, the district court found that the plaintiffs' attorneys had misused the discovery process because their primary purpose in deposing the defendants was to harass them and to gain information, not to advance the legal action. The district court ordered that plaintiffs' law firm, Licht & Semonoff, pay $1,000.00 to each of the two law firms

representing the defendants. Licht, 796 F.2d at 567.

On review, the Licht panel of this Court first examined whether it had jurisdiction. This Court determined that:

> In cases such as the one before us involving an immediate appeal of a sanction order against present counsel to one of the parties to the case, the law is not settled.
>
> * * *
>
> A "final decision" is ordinarily one which disposes of all of the rights of the parties to an action (citations omitted). The purpose of the § 1291 requirement limiting appellate review to final decisions is to avoid peacemeal litigation, promote judicial efficiency, reduce the cost of litigation, and eliminate the delays caused by interlocutory appeals (citations omitted). The requirement of a final decision is to be given a practical, not a technical meaning (citations omitted).

Licht, 796 F.2d at 569.

Applying these principals to the facts before it in Licht, this Court determined with respect to the finality requirement of 28 U.S.C. § 1291 that:

> [a]s a practical matter, which is the way we must apply the finality

> requirement of § 1291, the sanction may never be finally imposed. The case may be settled and the sanction rescinded by the Court as part of the settlement agreement. Or the Court may rescind or modify the sanction after verdict. We are not suggesting that any of these possibilities should or will be followed in this case, but their existence detracts from the finality of the order. We hold that a discovery sanction against counsel to one of the parties is not a final decision under § 1291.

Licht, 796 F.2d at 570.

The above finding of this Court in Licht involved far different facts than are instantly before it. First, the sanctions imposed herein by the district court did not arise out of a discovery order situation. Second, and much more importantly, the instant sanctions already have been imposed. Third, the district court herein already has refused to rescind its order. Fourth, these sanctions already have been paid.

This Court also looked at the finality of the district court's order of Licht as an exception under the "collateral order exception"

of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1948):

> The order must involve: (1) an issued essentially unrelated to the merits of the main dispute, capable of review without disrupting the main trial; (2) a complete resolution of the issue, not one that is "unfinished" or "inconclusive"; (3) a right incapable of vindication on appeal from final judgment; and (4) an important and unsettled question of controlling law, not really a question of the proper exercise of the trial court's discretion.

Licht, 796 F.2d at 570-71.

Although both the appellant and the appellees in Licht claimed that the exception applied because the firm faced potentially irreparable harm if this Court did not review the sanction order immediately, the Licht panel of this Court found that the asserted irreparability fell short of meeting the Cohen exception for two reasons. Licht, 796 F.2d at 572. First, the Licht panel found that the appellant therein did not meet its burden of establishing a "concrete example" that it could not appeal the sanction order if the underlying case was settled or dropped, or if the party it

represented was successful, or elected not to appeal district court's final judgment. Second, the Licht panel did not think that the firm's interest in challenging the sanction order against it would put it in an impossible ethical dilemma during settlement negotiations. Id. at 572. In reaching this decision, the Licht panel of this Court, however, expressed no opinion as to the appealability of sanctions against a non-party or an attorney no longer litigating the case. Id.

Once again, the facts in Licht are somewhat different. Appellant in this case is no longer required to defend one of its two clients in the underlying litigation. Group was dismissed by the district court on June 29, 1989. Consultants, appellant's other client, still is a party to the second trial phase proceeding presently ongoing before the district court.

This Court also recognized in Licht that:

> [w]e see no reason why an attorney should not be allowed to appeal a sanction order when the main case is terminated without an appeal. The

> sanction order affects the attorney directly and independently.

Id. at 572.

Despite acknowledging these implications, the Licht panel of this Court went on to state that:

> [w]e do not think, however, that the separability implied by the independent right of appeal is a valid argument for an immediate appeal. Appeal of the sanction is best heard after final judgment. If the judgment is appealed it will be helpful to the appellate court to be able to review the order against the background of the case as a whole. This is also more efficient and cost effective. Such an approach squarely comports with the Supreme Court's overriding policy to avoid peacemeal litigation. If in fact there is no final judgment for an appeal, we do not see how the firm will be irreparably harmed if its appeal is postponed until the case is finally terminated.

Licht, 796 F.2d at 572.

Unlike Licht, this case is a litigatory monster. It undoubtedly will continue for numerous years of an indefinite amount. There simply is no way of telling when a final judgment will be entered in the district from which appellant may be able to finally bring an

appeal to this Court. And, once any such final judgment ever were to be entered, appellant law firm may have undergone numerous changes. Partners may have come and gone. The firm itself may may have dissolved or merged with yet another firm. Any number of alternative events is possible. If an immediate appeal is not heard, it virtually would be impossible to determine which partners would be entitled to a replevy of the sanctions imposed, plus interest.

In essence, this case is vastly different from the facts in Licht. Herein, the sanctions already were imposed and have been paid. Moreover, the district court has refused to rescind these sanctions despite a clear opportunity to do so. None of these circumstances were present in Licht. As such, it most definitely should be found inapplicable to this appeal.

B. This Panel's Decision In Licht v. Semonoff Is Contrary To The More Recent Decisions Of At Least Five Other Circuits

Even if this Court were to decide that Licht & Semonoff were applicable (which is not

conceded), this Court, en banc, may wish to review its panel's decision. For, appellant has discovered at least five more recent decisions of other United States Circuit Courts of Appeal which are contrary. Specifically, the Second, Sixth, Seventh, Ninth, and Eleventh United States Circuit Courts of Appeals more recently have held contrary to the Licht panel of this Court.* These cases will be discussed seriatim in accordance with the number of the circuit.

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* Although prior to this Court's Licht panel decision, the Third Circuit also has held that an order imposing sanctions against counsel is immediately appealable. See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537-39 (3rd Cir. 1985).

Meanwhile, the Fifth Circuit apparently has not definitively ruled. In Click v. Abilene National Bank, 822 F.2d 544 (5th Cir. 1987), a panel of the Fifth Circuit ruled that a district court's imposition of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure is a nonfinal order. Id. at 545. Later, however, in Schaffer v. Iron Cloud, Inc., 865

Footnote continued on next page.

Most recently, the United States Court of Appeals for the Second Circuit decided Hoar v. Sara Lee Corporation, Nos. 88-7962 & 88-9010, Slip op. (2d Cir. August 10, 1989). In reaching its decision, the Second Circuit noted that "[t]he Supreme Court held in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1948), that some rights are simply 'too important to be denied reviewed and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated'." Slip op. at 7. The Second Circuit Court went on to note that Cheng v. GAF Corp., 713 F.2d 886 (2nd Cir. 1983), held that a non-party attorney may bring an interlocutory

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Footnote continued from previous page.

* F.2d 690 (5th Cir. 1989), another panel of the Fifth Circuit specifically stated that:

> Click does not indiciate whether the order imposing sanctions in that case required immediate payment, and this court has not determined whether such orders are final for purposes of appeal.

Id. at 692.

appeal of a Rule 37 sanction pursuant to the Cohen exception. Id. Thereafter, the Second Circuit made the following observation regarding the Supreme Court's decision in Cohen:

> In elaborating Cohen's "collateral order" exception, the Court has forged a three-part test to ascertain whether an order that does not finally resolve litigation is nonetheless appealable pursuant to Section 1291. The order must (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. Gulf Stream Aero Space Corp. v. Mayacamas Corp., 485 U.S. 271, ___, 108 S.Ct. 1133, 1136 (1988); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

Slip op. at 7.

The Second Circuit went on to note with regard to Cohen's three-part test that:

> [a]s to the first requirement, the assessment of the Rule 37 sanctions in the amount of $14,815.40 by the district court, after an appeal of the magistrate's order, amounts to "conclusive determination" (citations omitted). The second requirement is satisfied, since the imposition of the sanction involved an issue 'completely separate from the merits of the underlying litigation'.

> The third Cohen requirement presents a thornier issue. In Cheng, however, we enumerated several reasons why a sanction imposed on a non-party attorney is effectively "unreviewable after final judgment." (footnote omitted). First, in the face of settlement negotiations, an attorney might be placed in an "ethical dilemna" since "his view of any settlement proposal would almost certainly be colored by its handling of the attorneys' issue" (citation omitted). In addition, the plaintiff's attorney, as a non-party, would be dependent on the plaintiff for appellate review which would be unlikely "[i]f the case is settled, of if appellant succeeds on the merits" (citation omitted). Most importantly, a non-party attorney, like a non-party in civil contempt proceedings, would be precluded from arguing the propriety of the Rule 37 sanction for attorneys' fees including expenses in an appeal from the final judgment (citations omitted).

Slip op. at 8.

> We note that forcing an attorney to await final judgment, with such a sanction outstanding against him, may seriously affect his professional reputation; it will almost certainly affect the attorney's relations with his client as they must determine the share of the financial burden which each of them must bear in discharging the allegation imposed against them jointly. Therefore, the attorney should be able to appeal before any final judgment. He suffers immediate injury from the sanction whereby the court has made him a party to the case so far as the the sanction is

> concerned. His only effective remedy is to have the right to appeal before the final judgment. Accordingly, consistent with our holding in Cheng, we would grant jurisdiction were the sanction imposed on the non-party attorney alone, since unless there is the opportunity for review at this point in the proceedings, there effectively is no right to review at all.

Slip op. at 9.

Both the Sixth and Seventh Circuits similarly have stated that a non-party attorney has an immediate right to appeal although neither offered much analysis for their reasoning. The Sixth Circuit, in Lundblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989), relying on a Ninth Circuit opinion stated that it might have jurisdiction if the lawyer had in fact appealed in his own name. Id. at 1105. In Rogers v. National Union Fire Insurance Company, 864 F.2d 557 (7th Cir. 1988), the Seventh Circuit stated that sanction orders against attorneys are appealable before final judgment as collateral orders. Id. at 559. See also Frazier v. Cast, 771 F.2d 259, 262 (7th Cir. 1985).

The Ninth Circuit has dealt with this issue at least twice in the past two years. In Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548 (9th Cir. 1987), the Ninth Circuit stated that "[a]n order imposing sanctions solely upon counsel, a non-party to the underlying action, is immediately appealable as a final order." Id. at 556, citing Optyl Fashion International Corp. v. Style Companies Ltd., 760 F.2d 1045, 1047 n.1 (9th Cir. 1985); and Kordich v. Marine Clerks Association, 715 F.2d 1392, 1393 (9th Cir. 1983). More recently, in Aetna Life Insurance Co. v. Alla Medical Services, Inc., 855 F.2d 1470 (9th Cir. 1988), the Ninth Circuit revisited this issue. In response to urgings by the appellant to overturn the panel in Unioil, the Aetna panel of the Ninth Circuit stated:

> All prior holding that sanction orders issued solely against non-party attorneys are immediately appealable is controlling absent overruling by the Supreme Court or an en banc panel. Levick v. Skaggs Companies, 701 F.2d 777, 778 (9th Cir. 1983). We note that Rule 11 sanctions against non-party attorney are immediately appealable has been reaffirmed subsequent to the

> Supreme Court's most recent pronouncements in 1985 of the appealability of rulings on motions to disqualify attorneys. See Unioil, 809 F.2d at 556. Absent overruling, we must follow the law of this Circuit. Fenton v. Freedman, 748 F.2d 1358, 1359 n.1 (9th Cir. 1984). Accordingly, this sanction order, imposed solely against the non-party law firm is an immediately appealable order under Section 1291.

Aetna, 855 F.2d at 1473.

Finally, the Eleventh Circuit has reviewed this issue on at least two separate occasions since this Court entered its Licht decision. Shortly after Licht was rendered, the Eleventh Circuit stated in Robinson v. Tanner, 798 F.2d 1378 (11th Cir. 1986), cert. denied, 481 U.S. 1039 (1987), that:

> The courts have found discovery sanction orders immediately appealable where the sanction consisted of dismissal of the suit or a denial or grant of an injunction, the sanction was against a non-party who might not be able to obtain review from a final judgment, or the sanction would cause irreparable injury to the appellant (citations omitted).

Id. at 1381.

The Eleventh Circuit reached similar conclusions in Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512 (11th Cir. 1988):

> Appellants urge that the district court's assessment of sanctions payable immediately against a party and that party's attorney falls within the doctrine of practical finality, Forgay v. Conrad, 47 U.S. (6 How.) 201, 12 L.Ed. 404 (1848), and also within the collateral order exception to the final judgment rule, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We agree. When a Rule 11 sanctions directs a non-party (jointly and severally with parties to the action or alone) to pay immediately -- that is, before entry of final judgment -- significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order.
>
> Under the particular facts of this case, defendants successfully plead their case under two exceptions to the finality rule. Under the doctrine of practical finality, announced in Forgay, review of an order before entry of judgment in the underlying case is permissible whenever the order directs "immediate delivery of physical property and subjects the losing party to irreparable harm" if review is delayed until the case is concluded. In re Martin Bros. Toolmakers, Inc. 796 F.2d 1435, 1437 (11th Cir. 1986).

> Under the collateral order doctrine, an order resolving issues independent and easily separable from other claims in a pending lawsuit can be appealed prior to entry of final judgment. To fall within the collateral order exception, an order must satisfy three criteria under Cohen. It must: 1) conclusively determine the disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. See Cohen, 337 U.S.at 545-47, 69 S.Ct. 1225-26; United States v. One Parcel of Real Property, 767 F.2d 1495, 1497 (11th Cir. 1985).
> Ortho, 847 F.2d at 1515.

The facts of the instant case fall squarely within the parameters of the decision of these other five United States Circuit Courts of Appeals. As such, this Court should review, en banc, its panel decision in Licht. On this review, it undoubtedly will find that the decision in Licht is contrary to that of a majority of the United States Circuit Courts of Appeals in this country. Accordingly, the decision in Licht should be found to be distinguishable and inapplicable to this situation, or alternatively, overturned.

CONCLUSION

For all the foregoing reasons, appellant, the law firm of Jones Hirsch Connors & Bull, respectfully submits this Court has jurisdiction and should hear this appeal.

Dated: New York, New York
August 21, 1989

Respectfully submitted,

JONES HIRSCH CONNORS & BULL

By: /s/
Michael Piziali

Pro se Appellant
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New York, New York 10022

TO: Ana Luisa Navarro
Plaintiffs' Steering Committee Liaison

Carlos Padin
Defendants' Liaison Person

1696j

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1721

IN RE:
SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION,

JONES HIRSCH CONNORS & BULL,
Appellants.

Before

Campbell, Chief Judge,
Bownes, Breyer, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered October 3, 1989

We have considered the appellant's response to our show cause order of August 8, 1989. We have concluded that we do not have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291; that our opinion in Appeal of Licht & Semonoff, 796 F.2d 564 (1st Cir. 1986) is controlling; and that construing the appellant's response as a request for initial en banc consideration of its interlocutory appeal, the district court order at issue does not warrant en banc consideration of the continued viability of the Licht decision.

Appeal dismissed.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Messrs. Vaughan, Piziali, Padin, Gonzalez, Oliver, Jiminez and Plaintiffs' Steering Committee]